

C. Remarks

The claims are 1, 2, 4-11, 13-20, 25 and 29-34, with claims 1, 4, 6, 8, 10, 20 and 31-34 being independent. Each of independent claims 1, 4, 6, 8, 10, 20 and 31-34 has been amended to remove the phrase "at least"; in effect, the amount of calcium fortification has been limited to "about 10% U.S. RDV" in the present invention, thus addressing the Examiner's concerns regarding the absence of an upper limit. This amendment to the claims is fully supported by the specification as filed (see, e.g., page 7, line 18-20), and Applicants submit that no new matter has been added. Consideration of the present claims is respectfully requested.

In the final Office Action dated August 13, 2003, claims 10-19 were provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over the claims of copending Application No. 09/982,180. In an effort to expedite prosecution in this case, Applicants would like to respond to that rejection herein.

The independent method claims of the '180 application are as follows:

1. A method for preparing a stable, artificially-sweetened, calcium-supplemented beverage concentrate which comprises forming a stabilized solution of one or more calcium salts and one or more edible acids in water and subsequently adding an artificial sweetener to the stabilized solution to form the beverage concentrate.

17. A method for preparing a stable, artificially-sweetened calcium-supplemented beverage concentrate which comprises:

- a) preparing a first solution or dispersion of one or more calcium salts and water;
- b) adding one or more edible acids to the first solution or dispersion to form a second solution wherein the

one or more calcium salts and one or more edible acids are fully dissolved in solution;

c) adding an artificial sweetener to the second solution to form a third solution wherein the one or more calcium salts, one or more edible acids and artificial sweetener are fully dissolved in solution; and

d) optionally adding additional edible ingredients; thereby forming the beverage concentrate.

60. A method for preparing a stable, artificially-sweetened, calcium-supplemented full strength beverage which comprises forming a stabilized solution of one or more calcium salts and one or more edible acids in water and subsequently adding an artificial sweetener to the stabilized solution to form the beverage.

73. A method for preparing a stable, artificially-sweetened calcium-supplemented full strength beverage which comprises:

a) preparing a first solution or dispersion of one or more calcium salts and water;

b) adding one or more edible acids to the first solution or dispersion to form a second solution wherein the one or more calcium salts and one or more edible acids are fully dissolved in solution;

c) adding an artificial sweetener to the second solution to form a third solution wherein the one or more calcium salts, one or more edible acids and artificial sweetener are fully dissolved in solution; and

d) optionally adding additional edible ingredients; thereby forming the full strength beverage.

None of presently pending claims 10, 11 and 13-19 (claim 12 was previously cancelled) is obvious over the noted claims of the '180 application. The method claims of the '180 application are directed to forming stable artificially-sweetened calcium-fortified beverage concentrates and beverages. It is clear from the '180 application and its claims that it is necessary to form a stabilized solution of one or more calcium salts and one or more edible acids in water and to subsequently add an artificial sweetener and

optional other beverage ingredients to the stabilized solution to form the beverage concentrate or beverage. On the other hand, the presently claimed method comprises the steps of combining a ready to drink beverage with a calcium source consisting of a hydrate form of calcium sulfate and then preserving the beverage; there is no pre-formation of a stabilized solution of the calcium source with certain beverage ingredients. Given the clarity of the requirement for such a pre-formation step in the '180 application, one of ordinary skill in the art would not be motivated to modify the process of the '180 application to arrive at the presently claimed process. Accordingly, Applicants submit that the presently pending claims are not obvious over the claims of the '180 application and respectfully request withdrawal of the double patenting rejection.

Further, in the final Office Action dated August 13, 2003, claims 1, 2, 4-11, 13-20, 25 and 29-34 were rejected under 35 U.S.C. §103(a) as being obvious over Braun in view of Couzy and Lindon and further in view of Yang and Brafford. In an effort to expedite prosecution in this case, Applicants would like to respond to that rejection herein.

Applicants fully responded to this §103 rejection in the Response filed on June 26, 2003. However, Applicants do not believe that the response was fully considered by the Examiner when issuing the final Office Action, as evidenced by the Examiner's failure to counter Applicants' arguments with respect to teaching away, etc.; what is more, Applicants believe that the below-noted arguments should be considered anew by the Examiner in light of the present amendments to the claims. Accordingly, Applicants' arguments from the previous response are set forth again below in pertinent part.

There is no doubt that the present invention is not anticipated by any known prior art. This is evidenced by the lack of a §102 rejection. Therefore, the only remaining question is whether the cited combination of remaining references, i.e., Braun, Couzy, Lindon, Brafford and Yang, renders the invention obvious. Applicants submit that the answer to this query is no. In order to establish a *prima facie* case of obviousness, (1) there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings, (2) there must be a reasonable expectation of success and (3) the prior art references must teach or suggest all the claim limitations. The cited combination of Braun, Couzy, Lindon, Yang and Brafford fails in all three respects.

First, there is no motivation to combine the reference teachings. Braun relates to calcium-supplemented beverages which contain a preferred calcium salt blend and edible acids; Couzy and Lindon relate to a naturally-occurring and an artificial mineral water, respectively; Brafford relates to cheese and dairy products containing a particular calcium salt blend; and Yang relates to low acid calcium-supplemented beverages using a variety of calcium sources. There is certainly no explicit suggestion to combine these references. Applicants submit that there is further no implicit suggestion to be found. For example, there is just no apparent benefit to the combination of a mineral water with another type of calcium-supplemented beverage. Similarly, it would seem unlikely that a particular calcium salt blend which is effective in cheese would be combined with another calcium salt blend which is useful in beverages.

In an event, even if there were some suggestion to combine the references (which Applicants do not find), any beverage that would be made by combining Braun, Couzy, Lindon, Yang and Brafford would be very different from the presently claimed beverage compositions. In other words, the combination is flawed. A beverage obtained by combining the cited references would necessarily contain edible acids (Braun), other calcium salts (Braun, Brafford and Yang), minerals (Couzy and Lindon), and dairy or cheese components (Brafford). The presently claimed, bland, neutral tasting, calcium fortified beverage compositions consist only of purified water, a hydrate form of calcium sulfate in an amount providing fortification of about 10% RDV and optionally one or more non-mineral nutritional supplements, a flavor component and/or a preservative system.

Second, the cited combination of references provides no reasonable expectation of success in achieving an acceptable calcium-fortified beverage as presently claimed. Truly, the two newly cited references Brafford and Yang teach away from the present invention entirely. Brafford sets forth in its abstract:

By using a mixture of calcium sulfate and tricalcium phosphate the bitterness normally associated with calcium sulfate and the graininess normally associated with tricalcium phosphate are surprisingly essentially eliminated.

Given this disclosure, no one of ordinary skill in this art would expect a beverage fortified with calcium sulfate alone to provide an acceptable taste, as they would expect it to have a characteristic bitterness.

In addition, Yang sets forth in pertinent part:

Although some inorganic salts of calcium, such as calcium salts of bicarbonate, chloride, sulfate and some phosphates, possess a solubility which allows relatively high levels of calcium to be added to water, they produce unacceptable off tastes. Paragraph [0007].

Given this disclosure, no one of ordinary skill in this art would expect a beverage fortified with calcium sulfate to produce an acceptable taste, as they would expect it to have an unacceptable off-taste. Further, while Yang later identifies calcium sulfate as an acidic calcium salt (paragraph [0163]) which can be used therein as a calcium source, Yang sets forth that a lone acidic calcium salt can only be used when fortifying to a level of from 1 to 171 ppm elemental calcium concentration (paragraphs [0050] and [0068]). When fortifying to a level comparable to that achieved in the present invention, i.e., from 341 to 850 ppm in paragraphs [0105] and [0134], Yang sets forth that an acidic calcium salt must be used in combination with an organic calcium salt, a mixed organic acid salt, a basic calcium salt, an organic acid or a combination of these (paragraphs [0105] to [0123] and [0134] to [0152]). Given this disclosure, one of ordinary skill in this art would expect to achieve unacceptable results when fortifying with calcium sulfate alone at a level of about 10% RDV.

Further, Couzy and Lindon, directed to mineral waters, provide no expectation of success in achieving a calcium-supplemented non-mineral water beverage. Braun likewise fails to provide a reasonable expectation of success in achieving an acceptable beverage by fortification with calcium sulfate alone; Braun appears to premise

its success upon the combination of calcium salts and edible acids to facilitate solubility and enhance flavor.

Finally, the cited combination of references fails to teach or suggest all of the claim limitations. Most importantly, there is no identification in the cited references of a hydrate form of calcium sulfate as the sole source of calcium to provide a level of fortification of about 10% RDV as is presently claimed. In addition, there is no identification in the cited references of a beverage consisting only of purified water, such a calcium source, and optionally a non-mineral nutritional supplement, flavor and/or preservative, as is presently claimed. In fact, due to the numerous other ingredients necessarily present in all of the cited references, the references serve to teach away from the simply-constituted beverage compositions of the present invention.

In sum, the Examiner fails to establish a *prima facie* case of obviousness using Braun, Couzy, Lindon, Yang and Brafford. There is no motivation to combine the references, and, if combined, the combination of references fails to suggest the presently claimed beverage compositions. There is no reasonable expectation of success in achieving an acceptable beverage fortified to a level of about 10% RDV using a hydrate form of calcium sulfate alone. The cited combination of references fails to teach or suggest the claim limitations. Contrary to the Examiner's position, the present invention is not merely a recipe which has omitted certain ingredients. What the Examiner fails to realize is that it is truly surprising that a bland, neutral-tasting beverage having a calcium fortification of about 10% RDV can be obtained by using a hydrate form of calcium sulfate

as the sole source of calcium when no other ingredients are present to promote solubility or enhance taste.

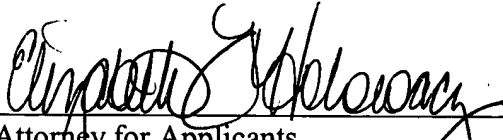
Furthermore, the present invention is also directed to a method of making beverage compositions as discussed above. None of the cited references disclose or suggest any of the steps of the presently claimed method. What is more, no *prima facie* case of obviousness is established with regard to claim 10 of the present invention for many of the reasons discussed above.

In sum, it is clear that none of Braun, Couzy, Lindon, Yang, Brafford and Applicants' chart, whether considered alone or in any combination, render obvious the present invention. There is simply no disclosure or suggestion of the use of a hydrate form of calcium sulfate alone as a source of calcium to produce a calcium fortified beverage composition (about 10% US RDV), the only other ingredient of which is purified water and optionally a non-mineral nutritional supplement, flavor and/or preservative. Accordingly, Applicants respectfully request withdrawal of this rejection.

In view of the foregoing remarks, favorable reconsideration and passage to issue of the present case is respectfully requested. If, upon consideration of this paper, the Examiner believes there are any outstanding issues, it is respectfully requested that the Examiner contact the undersigned attorney in an effort to expeditiously resolve such issues.

Applicants' undersigned attorney may be reached in our New York office by telephone at (212) 218-2100. All correspondence should continue to be directed to our address given below.

Respectfully submitted,



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